

**DECLARATION OF FABIOLA TORRES**

I, Fabiola Torres, declare and state as follows:

1. My name is Fabiola Torres. I am employed by PepsiCo, Inc. (“PepsiCo”) and I am the Chief Marketing Officer, Senior Vice President of Energy Category at PepsiCo. I live and work in Los Angeles, California, am over the age of twenty-one, have never been convicted of a crime, and am competent to make this declaration. This declaration is based on my personal knowledge. In preparing this declaration, I have also relied on my personal experience, my review of company documents and information, and, if called as a witness, I could and would testify competently thereto.

2. I have responsibility for marketing, sales and expansion of PepsiCo’s energy beverage business, including the conception, creation, development, marketing, advertising, promotion, launch, and sales of the MTN DEW RISE ENERGY line of beverages. I was hired specifically for the creation and launch of MTN DEW RISE ENERGY as well as the overall development of the PepsiCo energy portfolio.

3. To understand why this product offering bears the mark MTN DEW, I believe it is important to know the brand’s heritage. The MTN DEW beverage, which was created in the 1940s and is considered one of the most well-known beverage brands in America, is often touted as the original energy drink. After acquiring the brand in 1964, PepsiCo has continuously and substantially marketed, advertised, promoted and sold beverages, soft drinks and concentrates in connection with the mark MTN DEW and variants. The MTN DEW brand has appeared on hundreds of millions of cans and bottles, soda fountains, product packaging and marketing materials throughout its 70 years of continuous use, making it one of the most famous brands across the United States.

**Development of MTN DEW RISE ENERGY as an energy drink**

4. Given its heritage, PepsiCo has for many years considered how best to leverage the MTN DEW brand in connection with the energy beverage category. More recently, PepsiCo has been investing significantly in expanding its energy drink offerings through acquisitions and other business arrangements. As part of PepsiCo's increased focus on energy drinks (which is a separate category from ready-to-drink coffees) and with the backdrop of the Covid-19 pandemic, in the spring of 2020, I was hired to oversee development work on a new energy drink—intended to be more inclusive than typical energy drinks, which traditionally have a limited demographic base, and offer more benefits than the typical energy drink, with a focus on morning consumption. This innovative energy drink would imbue consumers with the notion of seeing each morning as a new opportunity to conquer the day by providing a mental boost, a clear and focused mind and immune support. PepsiCo's research showed a substantial population across a broad demographic of consumers interested in consuming energy drinks in the morning. PepsiCo spent months developing and testing the product, the name, and packaging, which culminated in the nationwide shipment on or before March 15, 2021, of MTN DEW RISE ENERGY fruit-flavored energy drinks, and an official product launch on March 17, 2021. On this date, MTN DEW RISE ENERGY was on shelves across the country, the official website went live ([www.mountaindewrise.com](http://www.mountaindewrise.com)), and the product's social media pages went live.

5. MTN DEW RISE ENERGY offers consumers a functional fruit-flavored, 5% juice energy drink with not just caffeine but also zinc, antioxidants, vitamins, and citicoline (for mental boost); this combination of functional ingredients differentiates MTN DEW RISE ENERGY from other energy drinks and supports PepsiCo's claims of "immune support" and "mental boost."

6. MTN DEW RISE ENERGY comes in an array of crisp, clean flavors with names

inspired by the creative flavor names of other MTN DEW products: Pomegranate Blue Burst, Tropical Sunrise, Strawberry Melon Spark, Peach Mango Dawn, Berry Blitz and Orange Breeze, each with a different color to highlight the individual flavor. The flavor profiles for this product are fruit-based and relatively sweet in taste without added sugar.

7. Both the flavors and colors of MTN DEW RISE ENERGY are meant to cue mornings and energy. The flavor names, including the words “sunrise,” “dawn,” “breeze,” “burst,” “spark,” and “blitz” connote mornings, new beginnings, vitality, and energy. Below are the different flavors of MTN DEW RISE ENERGY and their respective can designs.



8. PepsiCo carefully selected the mark MTN DEW RISE ENERGY and internally designed the packaging, using only PepsiCo employees, to educate consumers about the features of this new energy drink as well as to reinforce the drink’s ties to the famous MTN DEW brand. The packaging for MTN DEW RISE ENERGY signals its status in the energy drink category with bright and bold colors that are characteristic of the category but with the upbeat MTN DEW verve and zest for life for which it is known by loyal followers of the brand. Prominently featured on every can is a stylized lion, which is designed to further connote energy and power in a bold, colorful way that makes the product stand out on shelves, as well as in the minds of consumers.

9. The MTN DEW RISE ENERGY drinks, though representing an innovative product disruptor in the energy category, are still sold only in 16-ounce cans, the typical size of energy drinks like Rockstar Energy (another PepsiCo brand). The label further calls out the unique innovative benefits of the product by: (i) noting “Immune Support” and “Mental Boost” at the top of each can; (ii) referencing its juice content; (iii) noting 0g of added sugar; and (iv) identifying important ingredients such as zinc, vitamin A and C, as well as antioxidants. This label is intended to educate consumers and provide transparency about the contents of the drinks.



10. The cans of MTN DEW RISE ENERGY state that the product contains 180mg of caffeine, but many consumers need context to best understand that information. To do that, we put on the packaging itself that the caffeine is equivalent to 2 cups of coffee. Reference to 2 cups of coffee is a common measure of caffeine readily grasped by consumers, including our energy drink purchasers. That measurement or point of reference is not intended to target coffee drinkers, but rather to educate both existing and new consumers.

11. The overall MTN DEW RISE ENERGY packaging is different from typical ready-to-drink coffee packaging in several key ways. Canned coffee drinks generally have distinct visual cues in their packaging compared to non-coffee-flavored energy drinks such as MTN DEW RISE ENERGY. The names and labels of coffee-based drinks, like RBC's, often contain words descriptive of coffee or the brewing process, like “Latte,” “Nitro,” “Coffee,” “Espresso,” “Cold Brew,” and “Brew,” which are distinct from the names of energy drinks, which frequently include the word “energy,” as MTN DEW RISE ENERGY does. Coffee product packaging generally favor brown or tan colors, typically associated with coffee. MTN DEW RISE ENERGY does not use any of the brown or beige colors, like those used for ready-to-drink coffee drinks, which further

signal their coffee flavors, and instead uses bright and bold colors that call out the different fruit flavors. The 16-ounce cans used by MTN DEW RISE ENERGY and other energy drinks are more than twice the size of the typical 7-ounce ready-to-drink coffee drink, like those sold by RBC. That size difference further distinguishes the MTN DEW RISE ENERGY drinks as refreshing beverages to be consumed over a longer period of time for enjoyment.

**Development of MTN DEW RISE ENERGY as a MTN DEW product**

12. When considering product names and in consumer testing, PepsiCo saw benefits and synergies from building off of the significant goodwill developed over decades with the MTN DEW brand. The portfolio of MTN DEW products include carbonated soft drinks, frozen beverages (e.g., MTN DEW FREEZE), and energy type or styled drinks (e.g., MTN DEW AMP and MTN DEW GAME FUEL). PepsiCo sells hundreds of millions of these products across the country each year, generating billions of dollars in sales. PepsiCo also advertises its MTN DEW brand through the use of television and print advertising, online advertising, social media, prominent events, sponsorships and partnerships, and other ways customary in the beverage industry, generating billions of commercial impressions upon consumers each year. MTN DEW also sponsors action sports, teams, athletes and having fun outdoors as it has done for decades, e.g., DEW TOUR, X-Games, etc. As a result of PepsiCo's extensive promotional efforts and sales, PepsiCo's MTN DEW brand and related packaging are well-known to United States consumers nationwide. The marketing, advertising and promotion of MTN DEW RISE ENERGY drinks stay true to this brand heritage, following similar themes which are also reflective of the energy drink category.

13. To capitalize on this broad consumer recognition, the packaging of MTN DEW RISE ENERGY is meant to reflect the MTN DEW brand legacy, with elements and themes often

associated by consumers with MTN DEW beverages. The packaging prominently displays the famous MTN DEW mark—a distinct mark that slants to the upper right, pictured below—near the top of the can, in bold letters, superimposed over and locked-up with the word RISE, adjacent to ENERGY running vertically up its side, forming the distinctive composite MTN DEW RISE ENERGY logo. This distinctive MTN DEW logo consistently appears this way across these MTN DEW products:



14. The signature lion that is part of the MTN DEW RISE ENERGY logo is also composed of shards that cue the highly recognizable MTN DEW brand. These shards are prevalent in other MTN DEW products, for example in MTN DEW soft drinks, as seen here.



#### **Development of MTN DEW RISE ENERGY as a morning energy drink**

15. When developing MTN DEW RISE ENERGY, PepsiCo intended to create a unique energy beverage that would be a successful product line. PepsiCo selected the MTN DEW RISE ENERGY name and vibrant colors and graphics for this new product line because the overall combination captured the sense of morning energy and new beginnings (e.g., sunrise) as well as “rising up” and overcoming obstacles (e.g., the slogan “Conquer the Morning” used in advertising MTN DEW RISE ENERGY).

16. The inclusion of the word “RISE” in the MTN DEW RISE ENERGY mark had nothing to do with RBC or its products. The PepsiCo marketing team that came up with the MTN DEW RISE ENERGY name was not aware of RBC or its products when creating, testing, and proposing MTN DEW RISE ENERGY as a product name. I am not aware of any connection between Rise Brewing Company and its products and PepsiCo’s decision to develop the product line that became MTN DEW RISE ENERGY.

17. I do not know Thomas Gros, Helen Chen, Jillian Di Filippo, or Wing-Yan Choi. None of these individuals were involved in the development of MTN DEW RISE ENERGY. I understand that Mr. Gros, Ms. Chen, and Ms. Di Filippo no longer work at PepsiCo and that they worked in PepsiCo’s Global eCommerce Innovation Team, which was not involved with the development of MTN DEW RISE ENERGY. Further, PepsiCo already distributes Starbucks shelf-stable coffee drinks and would not market its own coffee drinks.

18. In adopting the distinctive MTN DEW RISE ENERGY mark and packaging, neither I nor anyone at PepsiCo copied RBC’s branding or product nor derived any benefits from RBC, its claimed marks, labels, or product packaging. PepsiCo never had any intent to confuse or deceive consumers. To the contrary, we wanted consumers to know and understand that MTN DEW RISE ENERGY was a completely new, original product offering unlike anything else in the market. Further, PepsiCo’s MTN DEW brand represents an incredibly valuable asset with incalculable goodwill, and PepsiCo has no need or intention to copy or trade off the goodwill of any other brand. Indeed, PepsiCo intended to create its own goodwill by creating a new and unique energy drink that would be a successful product line.

19. I am unaware of any third-party bottler, distributor, retailer, customer or consumer confusion about MTN DEW RISE ENERGY in relation to RBC or its products, any instance of



confusion about the source of MTN DEW RISE ENERGY or of any RBC product, or any misconception that there was or is some connection between MTN DEW RISE ENERGY and RBC or its RISE NITRO BREWING CO. or RISE BEWING CO. products.

### **MTN DEW RISE ENERGY Launch**

20. PepsiCo worked for months to prepare the launch of MTN DEW RISE ENERGY in March 2021. In the fall of 2020, PepsiCo began giving presentations regarding MTN DEW RISE ENERGY to its customers and retailers such as Wal-Mart and 7-Eleven. These presentations included mockups of the product and its packaging, renderings and sell sheets (a one-page advertisement describing the benefits and value of the product).

21. In early 2021, PepsiCo employees engaged in team meetings across various functions in order to strategize, create a plan, and coordinate the public roll out and launch of MTN DEW RISE ENERGY drinks. To assist with those efforts, PepsiCo also engaged two third-party advertising agencies: Laundry Service handled the website and social media content for the MTN DEW RISE ENERGY drinks and TBWA Worldwide created the brand campaign for MTN DEW RISE ENERGY.

### **MTN DEW RISE ENERGY Advertising and Marketing**

22. PepsiCo markets MTN DEW RISE ENERGY as a morning energy drink, building on the MTN DEW brand. On packaging and point of sale materials on retail store shelves, which are the primary means of marketing these energy drinks, PepsiCo uses the mark MTN DEW RISE ENERGY. When using any type of shorthand in promotional copy, PepsiCo uses the phrase MOUNTAIN DEW RISE or MTN DEW RISE, where the full name MTN DEW RISE ENERGY is generally reinforced. Our consumer marketing materials do not use either MTN DEW or RISE alone to refer to the drinks.



23. Advertising and promotional efforts for PepsiCo's MTN DEW RISE ENERGY products to date have included creating, developing, and producing packaging, labeling point of sale materials, TV, digital advertising, and other materials to market these new products, arranging for media purchases, and other general expenditures. These promotional efforts have included a sponsorship agreement with and two commercials featuring LeBron James, which were played during National Basketball Association television broadcasts and are available online. Advertisements have been placed on various social media channels (Twitter, Instagram, Facebook, etc.) as well as with Amazon and other e-commerce sites. Displays and graphics have been placed with shippers and at points of sale. PepsiCo has also paid for promotions and other sponsorships. Part of PepsiCo's marketing efforts focus on the action sports (e.g., surfing, skiing) whose participants and followers are key consumers of MTN DEW and energy drinks, as well as the X Games heritage that has long been a focus of the MTN DEW brand. PepsiCo expended significant time and effort, and over \$14 million in creating, developing, and producing packaging, labeling, point of sale materials, TV, digital advertising, and other materials to market these new products. However, the majority of these expenditures focused on in-store placements for the product.

24. MTN DEW RISE ENERGY is marketed as a morning energy drink, not as a coffee replacement, and is sold alongside other non-coffee-flavored energy drinks. PepsiCo's marketing materials and advertising intentionally do not suggest replacing coffee. At no point has MTN DEW RISE ENERGY come in a coffee or tea flavor, nor are there plans to introduce such flavors. Indeed, PepsiCo's partnership with Starbucks prohibits PepsiCo from offering coffee-based beverages. Starbucks itself is aware of the MTN DEW RISE ENERGY drinks and has not expressed any objection to the product line.

25. Although a "morning caffeine beverage category" is not a category typically used

in the beverage industry, MTN DEW RISE ENERGY is not the first caffeinated beverage targeted for morning consumption offered by PepsiCo: PepsiCo has been selling ready-to-drink coffee beverages for decades through its partnership with Starbucks and has offered MTN DEW KICKSTART beverages, which were launched with the tagline “Kickstart Your Day,” for years. In addition, PepsiCo research indicates that 40% of energy drinks are consumed in the morning.

**MTN DEW RISE ENERGY’s Success**

26. The feedback from customers to date has been overwhelmingly positive. PepsiCo retail customers—such as Walmart and 7-Eleven—have told PepsiCo that they like the product proposition and the product. There has not been any negative consumer or customer feedback about the quality of MTN DEW RISE ENERGY reported to me or my team.

**The Consequences of a Preliminary Injunction**

27. I believe an injunction would wreak serious, irreparable harm on the MTN DEW RISE ENERGY product line, including lost sales, possible loss of customers, reputational damage, the potential for customer and consumer backlash from PepsiCo’s loyal base, harm to PepsiCo’s overall MTN DEW brand, potential costs associated with re-branding, which would include agency fees and production costs, and costs associated with lost media purchases of approximately \$5.6 million.

Pursuant to 28 U.S.C § 1746, I, Fabiola Torres, declare under penalty of perjury that the foregoing is true and correct. Executed in Los Angeles, CA on this 10th day of August 2021.

  
FABIOLA TORRES